

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 06/28/13; Decision Issued: 08/13/13; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10056, 10085; Outcome: No Relief – Agency Upheld;
Administrative Review: EDR Ruling Request received 08/26/13; EDR Ruling No. 2014-3702 issued 09/19/13; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 08/26/13; DHRM Ruling issued 09/26/13; Outcome: AHO’s decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10056 / 10085

Hearing Date: June 28, 2013
Decision Issued: August 13, 2013

PROCEDURAL HISTORY

On January 30, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On February 19, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. Grievant was removed from employment based on the accumulation of disciplinary action.

On February 22, 2013, Grievant timely filed a grievance to challenge the Agency's first Group II Written Notice. On March 4, 2013, Grievant timely filed a grievance to challenge the Agency's second Group II Written Notice. The matter proceeded to hearing. On May 6, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 28, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employed Grievant as a Senior Program Manager. The purpose of her position was to:

Direct and manage the children's permanency programs, including all foster care and adoptive services, focused on positive outcome for at risk children and families in the Commonwealth. Assures effective and efficient administration in accordance with VDSS overall mission, vision, especially strengthening families and expanding the children's services transformation while adhering to the guiding principles of permanency programs and services.¹

Grievant had been employed by the Agency for approximately 11 years prior to her removal effective February 19, 2013. Grievant reported to the Supervisor. Except for the facts giving rise to these disciplinary actions, Grievant's work performance was

¹ Agency Exhibit 5.

satisfactory to the Agency. No evidence of prior active disciplinary action was introduced during the hearing.

On March 26, 2013, the Supervisor provided Grievant with a written counseling stating, in part:

The manner in which you perform your duties is a reflection of the leadership of this agency. That is why follow up, follow through, respect for others' time, and responsiveness are so important. I recognize that [your] workload is significant; you must juggle competing priorities on a daily basis; and you must rely on staff to whom you delegate responsibilities. Even so you are accountable for fulfilling commitments and following up to make sure that delegated responsibilities have been accomplished.²

In July 2012, the Supervisor asked Grievant to contact a Foster Parent. The Supervisor provided Grievant with the Foster Parent's telephone number and asked Grievant to discuss with the Foster Parent a planned foster parent survey. The Supervisor wanted Grievant to build a relationship with the Foster Parent in order to turn the Foster Parent from being an opponent into being an advocate for the Agency. Grievant did not contact the Foster Parent. In October and November 2012, the Supervisor again told Grievant to contact the Foster Parent. Grievant failed to contact the Foster Parent. On January 9, 2013, the Supervisor learned that Grievant had not contacted the Foster Parent. Grievant finally called the Foster Parent. The Foster Parent reacted negatively towards the Agency because she was not called on a timely basis.

On January 23, 2013 at approximately 10:15 a.m., Grievant attended a meeting with the Agency Head, Chief Financial Officer, Supervisor, Budget Director and several other Agency managers. They were seated at a table. They were discussing how to respond to a question posed by a staff member of the House Appropriations Committee. The question involved how the Agency intended to defend its request for \$1.35 million in the budget even though the Agency had received \$800,000 from another source.³ The Budget Director told Grievant to write a justification for the funding and provide that response to the Budget Director by 3 p.m. that day. Grievant told the group that she would take care of the task right away. The meeting ended at approximately 11 a.m. or 11:15 a.m. Grievant returned to her desk. At approximately 12:30 p.m., the Supervisor asked Grievant to meet him at the General Assembly building to assist with addressing a pending bill.

² Agency Exhibit 6.

³ In an email to the Budget Director, the House Appropriations Committee employee asked, "What are the planned uses for that funding and the timetable for implementing?" See, Agency Exhibit 4.

At approximately 2:50 p.m., the Supervisor received a call from an agency manager asking for the information Grievant was to provide. The Supervisor located Grievant and told her to return to the office to complete the assignment. Grievant returned to the office. She drafted the language and submitted it to the Budget Director by 3:21 p.m. The Agency ultimately received the requested funding.

The Supreme Court's Director of Court Improvement asked the Agency to post on its website a document explaining the rights of foster parents. On January 29, 2013, the Supervisor instructed Grievant to post the brochure on the Agency's public and internal websites by February 8, 2013. Grievant delegated responsibility for the task to her subordinates, Ms. B and Ms. M. On January 29, 2013, Grievant forwarded a copy of the email from the Supreme Court's Director of Court improvement to Ms. W. Grievant and Ms. B and Ms. M decided it made better sense to include the brochure's link in the pending foster care and adoption manuals.⁴ This decision was based on the lack of a good location for the brochure on the Agency's website and the need to connect the brochure with guidance put forth by the Agency in both manuals regarding foster parents and pre-adoptive parents' rights as it related to court hearings. This process could not be completed by February 8, 2013. Grievant did not notify the Supervisor that she had concluded to delay the posting of the brochure.

Changes to the foster care and adoption manuals were posted to the Agency's website in April 2013.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."⁵ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

Failure to follow a supervisor's instructions is a Group II offense.⁶

First Group II Written Notice

In July, October, and November 2012, the Supervisor instructed Grievant to call the Foster Parent. Grievant did not call the Foster Parent thereby disregarding the

⁴ The Agency periodically posted its manuals to the Agency's websites when significant updates were necessary.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁶ See, Attachment A, DHRM Policy 1.60.

Supervisor's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant argued that she was not given a time frame to contact the Foster Parent. She testified that she did not recall being instructed to call the Foster Parent in July and October but remembered the November instruction. She also testified that she forgot to call the Foster Parent. Although the Supervisor may not have provided a specific deadline, it is clear that he expected some attempt to contact the Foster Parent within a reasonable time period. Grievant had more than a reasonable time period after November 2012 in which to call the Foster Parent but failed to do so because she forgot the assignment.

The Agency alleged Grievant failed to comply with the Budget Director's instruction to draft an explanation supporting its claim for additional funding from the General Assembly. Grievant argued that she knew of the assignment and knew that the information was needed that day but she did not hear that a deadline of 3 p.m. had been established. In addition, it is not clear that the Budget Director had a supervisory role with respect to Grievant. If the Hearing Officer assumes for the sake of argument that Grievant did not hear the 3 p.m. deadline, there remains sufficient evidence to support the issuance of a Group II Written Notice. On three separate occasions, a supervisor instructed Grievant to call the Foster Parent. Grievant's failure to do so is sufficient evidence to support the Group II Written Notice.

Second Group II Written Notice

Grievant was instructed by the Supervisor to post a brochure on the Agency's internal and external websites by February 8, 2013. The task was significant to the Agency because it originated from the request of an important customer of the Agency, the Supreme Court's Director of Court Improvement. Grievant delegated the task to her subordinates. Grievant and her subordinates decided that the brochure should be posted as part of a manual revision rather than immediately as directed by the Supervisor. Grievant did not tell the Supervisor of her decision or seek his approval. Instead, she knowingly disregarded the Supervisor's deadline. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.

Grievant argued that she did not intend to disregard the Supervisor's instructions but rather delegated that instruction to her subordinates. The evidence showed that Grievant had been counseled regarding the importance of "follow up" but she failed to contact the Supervisor to inform him of her preferred method of posting the brochure.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁷ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of the first Group II Written Notice of disciplinary action for failure to follow a supervisor’s instructions is **upheld**. The Agency’s issuance to the Grievant of a second Group II Written Notice of disciplinary action for failure to follow a supervisor’s instructions is **upheld**. Grievant’s removal is **upheld** based on the accumulation of disciplinary action.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before

⁷ Va. Code § 2.2-3005.

the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁸

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.